SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 455

CLAYTON H. STIEF,

Petitioner,

v.

J. A. SEXAUER MANUFACTURING CO., INC.

and

DIAMOND ALKALI COMPANY,

Respondents.

BRIEF OF RESPONDENT J. A. SEXAUER MANUFACTURING CO., INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Introductory

Petitioner had appealed to United States Court of Appeals for the Second Circuit from a judgment dismissing his personal injury action after trial before the Hon. THOMAS F. CROAKE and a jury in the United States District Court for the Southern District of New York. The Court of Appeals affirmed.

Petitioner had been injured as a result of an alleged explosion resulting from use of a drain pipe cleaning product, "Mule-Kick" packaged and marketed by the respondent J. A. Sexauer Mfg. Co., Inc. and manufactured by the respondent, Diamond Alkali Company. The accident occurred in Pennsylvania and, concededly, Pennsylvania law controls (399a). Under Pennsylvania law, a warranty action is not maintainable under the circumstances here present (399a). The only question was whether petitioner had established a *prima facie* case in negligence.

Petitioner claimed that the day after he deposited a second can of "Mule-Kick" into a clogged drain at a home in Lancaster, Pa., an "explosion" occurred in the pipe, forcing out a metal plug in a clean-out opening thereof, following which a spray of sodium hydroxide solution issued from the opening striking petitioner some eight or ten feet away, causing him to sustain burns.

The chief ingredient of "Mule-Kick", as it is of all drain cleaners, is sodium hydroxide or lye. Admittedly sodium hydroxide has no explosive characteristics (737a-738a).

The cause of the "explosion" of this non-explosive material was alleged to be hydrogen formed by the reaction of the sodium hydroxide with zinc. Admittedly, there was no zinc in "Mule-Kick" (792a). It was claimed that zinc was present in the material that was clogging the pipe.

In addition to the admission that "Mule-Kick" did not have hydrogen producing adulterants, either zinc, or any other, it was also undisputed that the sodium hydroxide in "Mule-Kick" was commercially pure (622a), and it was conceded that the product was well fit for its intended use (817a). Of necessity, the various claims of negligence with respect to the manufacture of the product and the use of dangerous substances therein had to be abandoned. The only claim of negligence urged is that stated at pages 10-11 of the petition, viz., alleged deficiencies in the label placed on the can of "Mule-Kick".

Questions Presented

Petitioner concedes (p. 17) that there may be such a deficiency in proof, that a defendant is entitled to a directed verdict. This Court has held, in *Neely* v. *Martin K. Eby,* 87 S. Ct. 1072 (1967), that the Seventh Amendment is not violated when a Court of Appeals holds that there is insufficient evidence to present to a jury with respect to the issues of negligence and proximate cause.

Accordingly, the question which petitioner says was left open in *Byrd* v. *Blue Ridge Elect. Cooperative,* 356 U. S. 525, has been answered. The only question is, therefore, whether the Court of Appeals, in affirming the District Court's dismissal of the complaint, had properly applied pertinent Pennsylvania law to the proof that was adduced.

The applicable Pennsylvania law is:

> "But beyond this generality, every case must turn upon a determination of what will be reasonable behavior by the defendant considering his actual or imputed knowledge, both of the danger and the need to warn or otherwise protect users against that danger."
>
> *Hopkins* v. *E. I. Du Pont de Nemours & Co.,* 212 F. 2d 623, 625 (3rd Cir.).

> "In this situation the law of Pennsylvania is clear. It starts with the general proposition that the plaintiff bears the burden of proving that negligent conduct of the defendant was the proximate cause of plaintiff's injury. Erbe v. Philadelphia Rapid Transit Co., 1917, 256 Pa. 567, 100 A. 966; Sandt v. North Wales Foundry Co., 1906, 214 Pa. 215, 63 A. 596. But where plaintiff's evidence supports an inference that excludes liability of the defendant just as strongly as an inference that comprehends liability, a jury would have to engage in speculation and conjecture in order to attribute the accident to one rather than the other.

Dangelo v. Pennsylvania R. Co., 1930, 301 Pa. 579, 152 A. 743. Where plaintiff thus leaves the jury to guess as between suggested causes, there can be no recovery. Fix v. Pennsylvania Power & Light Co., 1943, 346 Pa. 598, 31 A.2d 114; Houston v. Republican Athletic Ass'n, 1941, 343 Pa. 218, 22 A.2d 715; Anderson v. Reading Co., 1932, 306 Pa. 246, 159 A. 450; Gausman v. R. T. Pearson Co., 1925, 284 Pa. 348, 131 A. 247."

Hopkins v. *E. I. Du Pont de Nemours & Co.*, 212 F. 2d 623, 626 (3rd Cir.).

Statement of the Case

On January 25, 1961, petitioner, a full fledged licensed plumber (235a-238a), experienced in freeing clogged drains (238a) was directed by his employer, together with a fellow employee, Nixdorf, an equally experienced plumber (238a, 403a), to 5 Locust Street, a two-family house in Lancaster, Pa., to repair a clogged drain in the kitchen sink of the second floor apartment (207a, 208a).

Manipulation of a plunger proving ineffectual (209a-210a) the men decided to use "Mule-Kick" which petitioner had used before and always kept on the truck for use when mechanical means of clearing a stopped drain proved ineffectual (212a, 243a-244a, 246a-248a). It was the only kind of drain cleaner preparation he used (247a).

"Mule-Kick" is essentially sodium hydroxide or caustic soda, i.e., lye (728). Caustic soda has been used commercially in drain cleaning preparations for the past 40 years or more (907a-908a). It is the basic constituent of all drain cleaners (906a). Concededly, sodium hydroxide has no explosive characteristics (737a-738a). When dissolved in water it does not give off any gases (908a). It plays a role in the production of hydrogen when reacting with aluminum or zinc (636a-637a). Admittedly there was no zinc in "Mule-Kick" (792a).

The cleaning properties of sodium hydroxide arise out of the fact that when it combines with the grease that is usually present in a stopped up drain it forms ordinary soap, readily soluble in water (908a-909a).

Petitioner had read the label on "Mule-Kick" many times (273a, 658a), and was fully aware that burns could be caused by contact with it, he always used "Mule-Kick" carefully to make sure that there was no splattering, no contact with the hands or face (243a, 264a, 265a, 266a, 271a, 277a, 278a, 279a). It was common knowledge among plumbers to avoid contact with it because it, as well as any other drain cleaner, could cause a bad burn (447a, 448a, 503a).

Petitioner on this occasion again read and followed the instructions on the label (273a-276a). He and Nixdorf removed the water from the drain (210a), poured the contents of a can of "Mule-Kick" into boiling water in two batches, stirring until the "Mule-Kick" was dissolved, emptied the solution into the drain, and left the premises (213a, 214a). Nixdorf cautioned the tenants not to get their hands into the solution because they might get burned (502a).

On the next day, January 26th, petitioner returned alone, Nixdorf had been despatched to another job (214a). The drain was still stopped up (215a). Following the same procedures as before, petitioner used a second can of "Mule-Kick" and once more left the premises (215a, 216a).

When petitioner returned on January 27th, the sink was still clogged (216a, 218a). It became necessary to trace the line in order to determine just where the stoppage was located. This required removal of flooring wherever it covered the pipes (216a). Exposure of the pipes under the flooring of the second floor disclosed that the pipe was filled with liquid at that point (218a). Petitioner thereupon went to the first floor apartment and traced the drain pipe to a wall in the pantry off the kitchen (219a). He

removed the flooring there and saw a section of pipe with a metal plug covering a clean-out opening in it (219a, 220a). The pipe was roughly 17 inches long (910a), about 1½ inches in diameter (300a). It had a two-inch galvanized elbow at its top (721a, 911a). The clean-out opening was 2½ inches below the lower end of the galvanized elbow (911a).

Petitioner removed the plug, there was no seepage there (220a). This led him to the conclusion that the stoppage was above, somewheres between the first and second floors (271a, 304a, 311a, 321a, 346a). He testified that when he removed the plug, he saw a small forming of ice (221a), and that it was not the cause of the clogging of the drain (323a-324a). This forming of ice was in the pipe 6 or 8 inches above the clean-out hole (331a-333a, 342a). Obviously, the stoppage was located above the galvanized elbow the upper edge of which was four inches above the clean-out opening (911a). He replaced the plug, tightening it by hand (224a, 321a), "finger tight" (337a). Note Nixdorf's testimony that the threads of the cut-out opening was degenerated (470a), there were no threads (539a). Although there was only a "small forming" of ice, petitioner went to his truck and fetched a Prestolite torch, which emits heat of 3500° Fahrenheit (776a), because, he figured that while he was there, he "might as well get rid of this small forming of ice to eliminate future trouble" (222a).

This claim of a small forming of ice unrelated to the clogging of the drain was new-born in the litigation. On March 3rd, 1961, a few months after the accident, before any suit was initiated, petitioner, when interviewed by an investigator for the Workmen's Compensation carrier, made the following written statement (Defendant's Exhibit A, 339a):

> "After the plug was removed, I could see that there was ice blockage that was causing the trouble. I replaced the plug and used a torch to heat the drain pipe under the floor, where the ice blockage was located."

The pipe was located in an outside wall (303a-304a) and it is to be noted that the temperatures on January 21st ranged from —8° to 21°; on January 22nd from —13° to 19°; on January 23rd from —9° to 21°; on January 24th from —7° to 21°; on January 25th from —1° to 18°; on January 26th from —1° to 16° and on January 27th from —20° to 1° (843a-844a).

The need for petitioner's change of position with respect to the presence of ice and its effects becomes apparent when we analyze the expert evidence.

After petitioner applied heat to various parts of the pipe, he took a snake to the second floor and ran it through the lines (222a, 343a). Nothing happened, the water remained (222a). As he was manipulating the snake, he could see the mixture inside the pipe (347a). There was no spraying, no bubbling, no signs of pressure, no evidence of escaping gases, no propulsion upward of any fluid (347a-349a).

Petitioner did not know what to do next and went back to the first floor (223a). He stationed himself at the pantry door some distance away from the pipe he had heated, contemplating his next move, when he heard a noise like a firecracker and was then hit by a spray of sodium hydroxide solution issuing from the clean-out opening (223a).

Petitioner's theory of the accident, advanced through a chemist, Dr. Willard, was that the pipe had been clogged at the galvanized elbow; that the clogging material contained zinc; that the sodium hydroxide of the "Mule-Kick," combined with this zinc to liberate hydrogen, that the hydrogen forced the plug out of the clean-out opening causing the sodium hydroxide solution to spray out (712a, 720a, 727a, 729a-731a, 791a).

POINT I

Assuming the accident happened as claimed, the courts below correctly ruled that there was no issue as to negligent deficiencies in labelling.

The alleged failure to warn against possible explosions. (Petition, p. 11)

There was no proof of an "explosion". The claims of "explosion" comes only from petitioner's counsel. The expert, Dr. Willard, never said there had been an explosion. She claimed that the plug had been forced by the "pressure" of hydrogen forming and trapped between the clogging material and the sodium hydroxide solution above (729a-731a). In any event, the statement that the label should have warned of a possible explosion is a meaningless generality, as was pointed out in *Hopkins* v. *E. I. DuPont de Nemours & Co.* (3rd Circuit), 212 Fed. 2d 623, when it discussed *Maize* v. *Atlantic Refining Company,* 352 Pa. 51, so strenuously relied upon by petitioner. We quote again (p. 625):

> "But beyond this generality, every case must turn upon a determination of what will be reasonable behavior by the defendant considering his actual or imputed knowledge, both of the danger and the need to warn or otherwise protect users against that danger."

Prosser, Torts, 2d Edition, page 121 summarizes the problem:

> "A risk is a danger which is apparent, or should be apparent, to one in the position of the actor. The culpability of the actor's conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward 'with the wisdom born of the event.' The standard must be *one of conduct, rather than of consequences* . . . The court must put itself in the actor's place." (Emphasis supplied)

Since sodium hydroxide admittedly has no explosive characteristics, the issue is the foreseeability of explosion by contact with other materials, specifically by formation of hydrogen, the purported explosive agent in this case.

The presence of zinc is the alleged cause for the formation of hydrogen. Aluminum concededly was not present anywhere (804a, 806a). The issue is, therefore, not whether it was known to Sexauer as a general proposition of chemistry that sodium hydroxide in combination with zinc would liberate hydrogen but whether it knew or should have foreseen and warned against that chemical possibility under the circumstances of this case. This requires an examination of the source of the zinc which purportedly combined with "Mule-Kick" to liberate hydrogen.

It was petitioner's claim that the material that clogged the drain contained all sorts of waste matter, including 1.2% of zinc (715a-720a, 794a) which reacted with "Mule-Kick" to produce hydrogen (729a-731a, 791a).

It is "Mule-Kick's" reaction with this zinc, adventitously present in the stoppage material clogging the drain and discoverable only by microscopic examination, that petitioner contends respondent Sexauer should have warned about on the label.

The record makes clear the complete unreasonableness of this contention.

There was no proof of the frequency with which clogging material in drainpipes contained zinc elements.

There was no proof that clogging material in drainpipes usually contains zinc elements.

Sodium hydroxide has been used as an ingredient of drain cleaning preparations for forty years (907a). All drain cleaning preparations have sodium hydroxide (906a). One would think that if there were a foreseeable hazard of explosion or dangerous pressures resulting from the formation of hydrogen caused by a reaction of sodium hy-

droxide with zinc-containing clogging material there would be some prior similar incidents. No such proof was made, or even attempted.

The proof was that in the 5 years prior to 1960, 3,800,000 cans of "Mule-Kick" have been manufactured and used (1038a). There is no suggestion that during those years there had been so much as one complaint of any such incident as here allegedly occurred.

Why, in all reason, should a warning be given of the hazards of an explosion or dangerous pressures caused by the liberation of hydrogen induced by the reaction of sodium hydroxide with zinc elements fortuitously present in material clogging a drain when, in all the years of practical experience no such incident was ever heard of?

> "When a manufacturer has used a particular design for along time or on an extensive scale without mishap, this would seem an important indication that no unreasonable risk is created by continued distribution of a product of a particular design."
>
> Noel, Manufacturer's Negligence of Design or Directions for Use of a Product (71 Yale Law Journal 816 at p. 830).

The accident in this case, even if occurring as petitioner claimed, which we do not concede at all, exemplifies the truism expressed by the Court in *Schfranek* v. *Benjamin Moore & Co.*, 54 Fed. 2nd 76, 77 (DCSDNY):

> "The zone of the possible in casualties is practically limitless.
>
> "Almost anything in the way of an accident is possible. Fully to realize such possibilities usually requires much reflection after the event.
>
> "The zone of the probable, however, is very much narrower, and that is the zone with which tort liability is concerned, and a survey of it involves the exercise of reasonabde foresight only."

The presence of zinc elements in clogging material in a drainpipe, let alone in quantities sufficient to create an explosive amount of hydrogen, is so remote, so far-fetched, so unusual, so outlandish, that there can be no factual basis for a jury to say that such a hazard was reasonably expectable so as to require warning,

> "[W]here there might be only a remote possibility of danger, failure to warn is not negligence."
>
> *Bish* v. *Employers Liability Assurance Corp.* (5th Cir.), 236 Fed. 2d 62, 69.

In *Kaempfe* v. *Lehn & Fink Prods.*, 21 App. Div. 2d 197, it was said at page 200:

> "On the other hand, it is clear that the manufacturer or seller should not be held bound to anticipate and warn against a remote possibility of injury in an isolated and unusual case. The law requires a person to exercise reasonable care to guard against probabilities, not mere remote possibilities. A supplier of a product in daily use ought not to be placed in the position of an insurer.'

In *Boyd* v. *American Can Company*, 249 A. D. 644, affd. 274 N. Y. 526, it was pointed out that a manufacturer "may not be charged with negligence where some unusual result occurs that cannot reasonably be foreseen and is not within the compass of reasonable probability. It is not enough that in the intended use injury is possible."

The point is pithily summed up by the Court in *Jamieson* v. *Woodward & Lathrop*, 247 Fed. 2d 23, 29 (USCADC), cert. denied 355 U. S. 55:

> "Reasonable foreseeable in the rule here applicable does not encompass the far reaches of pessimistic imagination."

We assume that the purpose of the warning contended for is to deter persons from using "Mule-Kick" when there is zinc in the material clogging the drain pipe. This would require knowledge of the ingredients of the clogging material. How does petitioner propose that this knowledge be acquired? To determine the presence of zinc in clogging material by microscope or otherwise, would require the removal of the clogging material for examination. If that can be done, then there is no need for "Mule-Kick" or any other similar drain cleaning product. The very purpose of "Mule-Kick" and other like products is to cope with clogging material that cannot be effectively handled by mechanical means. Surely petitioner does not suggest that if a pipe is clogged by waste material that cannot be removed by mechanical means, no drain cleaning preparations should be used, because perchance, the stoppage might contain zinc elements which could combine with sodium hydroxide to liberate hydrogen. That is the plain implication of the suggested warning. The suggested warning is so divorced from practical reality as to demonstrate its lack of reasonableness. As has been said, in the striving for safety one is not required to go beyond the bounds of what is practicable and reasonable. (*Beauchamp* v. *N. Y. C. Housing Authority,* 12 N. Y. 2d 400, 407.)

Dr. Willard had made it clear that the source of the zinc that she was opining about was in the clogging material, which may or may not have come from the galvanized elbow (796a-807a). Apart from that there was no evidence to establish the need for a warning that the passage of "Mule-Kick" through a galvanized elbow created a danger of forming hydrogen in dangerous quantities. The only evidence remotely relevant to that claim was given by Nixdorf, a fellow worker of the plaintiff, an experienced plumber (238a, 403a). He testified that in all his years of plumbing experience and as a trouble shooter, he had used "Mule-Kick" on *all* types of pipes, he never intimated that he had experienced any difficulty (502a).

Plaintiff, a similarly experienced plumber, said nothing about any observations made in the years that he plied his trade of cleaning clogged pipes that as much as hinted at anything untoward occurring when "Mule-Kick" was poured into galvanized pipes.

Neither from the body of scientific knowledge or from the history of the use of drain cleaners, was there any intimation of a known or experienced danger from gases related to classification of drain pipes and, hence, to be warned against.

Here, too, the duty contended for, to be meaningful, would require that every time there was a clogged drain problem that could not be resolved by mechanical means, the floors and walls of the building would have to be ripped apart, as was done in this case, to determine whether, by chance, the section of the drainage system where the stoppage occurred utilized galvanized pipe.

We submit, accordingly, that the alleged hazard of hydrogen forming by the reaction of "Mule-Kick" with a galvanized pipe was so remote, so distant, so unlikely, that there could be no rational basis for a determination that there was a need to warn against it.

Apart from the above, the proof is clear that the galvanized elbow could not possibly have played a role in the alleged production of hydrogen. As pointed out earlier, petitioner saw ice forming 6 or 8 inches above the clean-out opening, meaning that the stoppage material, if acting as claimed, was above the galvanized elbow which ended four inches above the clean-out opening.

How it is possible for the zinc of the galvanized elbow to travel *upwards,* through the air tight stoppage, in order to combine with the sodium hydroxide resting on the stoppage material was never explained. It cannot be explained.

The claim that the label was misleading in its statement that there was no disguised perfumes, no dangerous bubbling adulterants, causing injurious spray, explosive gases and harmful fumes. (Petition, p. 11)

This claim is an exercise in reckless averment.

The adulterants which can cause bubbling and the formation of explosive gases are zinc and aluminum.

Dr. Willard, who analyzed "Mule-Kick" on behalf of petitioner admitted that "Mule-Kick" had no zinc adulterant (792a).

Dr. Willard never claimed that "Mule-Kick" had any aluminum adulterant. Dr. Snell testified that it did not (907a). His testimony was undisputed.

Dr. Willard conceded that "Mule-Kick" was a product well fit for its intended purpose (817a). She made no claim that the sodium hydroxide in it was impure (817a). The proof that it was commercially pure (622a) was undisputed.

Petitioner and his fellow worker, Nixford, had used "Mule-Kick" many times before. Neither claimed that on any occasion it had ever been observed to bubble, to spray, to emit gases or fumes of any kind.

In the face of the above concessions, admissions and undisputed proof, it would be impossible for a jury to find that there was any misstatement in the label when it set forth that "Mule-Kick" contained "no disguised perfumes, no dangerous bubbling adulterants, causing injurious spray, explosive gases or harmful fumes." If there were such a finding by a jury it would be in plain and impermissible disregard of all the evidence in the case.

The claim that the label was misleading because the word "safe" was used. (Petition, p. 10)

This claim demonstrates the fallacy and vice of urging a contention on the basis of a word taken out of context.

Any fair reading of the writing on the can makes it apparent that there was no representation that here was a product that was totally harmless under all circumstances. It had the legend "poison"; it contained cautions to keep away from face and hands. It advised of antidotes to caustic burns, external and internal, with specific reference to the eyes. No one who could read could possibly be misled into believing that he was using a bland, innocuous product, harmless no matter how used.

It is clear that the word "safe", when read in context, referred to the fact that it had no disguised perfumes, no dangerous bubbling adulterants, causing injurious spray, explosive gases or harmful fumes. We have demonstrated that the product was exactly as labelled, that it had none of these hazards.

Nothing demonstrates more cogently that "Mule-Kick" was a safe drain pipe cleaning product, as labelled, than its prior use by petitioner. He had used "Mule-Kick" many times before. It was a standard item he always kept on his truck for use when mechanical means of freeing drains proved ineffective. It was the only drain cleaner he used (212a, 243a-247a).

When petitioner used "Mule-Kick" carefully, as directed it never caused him any harm (264a, 659a-660). In other words, as was testified to by all, when used properly it was a safe draing cleaning product (264a, 449a, 1027a). That is all that the label said it was. True if misused, as by spilling or splattering over the hands, or on the face, or the body, harm could come. But harm can come from use or misuse of anything. Because a hammer can mash a thumb, or a

knife can cut a hand, or a stove burn a finger does not make the hammer or knife or stove unsafe.

There is not so much as an intimation that in all of petitioner's prior use of "Mule-Kick", there has ever been a bubbling or spraying, or formation of gases, explosive or otherwise, or the production of mumes of any kind. If there had been, surely petitioner wolud have worn the goggles that his employer had furnished him to use when working with "Mule-Kick" (547a-549a). He never used them (247a), clearly demonstrating that there was no known hazard of bubbling, spraying, gases or fumes inherent in "Mule-Kick". At all times the product was as labelled, a safe drain cleaner, containing no disguised perfumes, dangerous bubbling adulterants, causing injurious spray, explosive gases or harmful fumes. There is no evidence which would permit a jury to find that "Mule-Kick" was not as safe as the label said it was.

The claim of negligence in labelling because the words "lye"—"or caustic soda" were not used. (Petition, p. 10)

The label stated that the product contained sodium hydroxide. This, argues the petitioner, was not enough. The description, he urges, should have used the words "lye" or "caustic soda." Apart from the fact that there is no evidence that such a labelling was required by any statute, rule, regulation, usage or custom, the claim of negligence in that regard is a meaningless abstraction. Since sodium hydroxide (lye) has no explosive characteristics, we assume that the gravamen of the claim that the words "lye" or "caustic soda" should have been used is to caution users against the possibility of burns to the end that uers could take appropriate action to avoid possibility of injury of that nature.

That caution was present in no uncertain language. The label contained the warning "Poison". The label warned the user that if there was contact with "Mule-Kick", to

call a physician. It told the user of the possibility of caustic burns and advised what antidotes to use for such burns, whether internal and external, with specific reference to the eyes. How much more information would petitioner have had about the hazards of burns were the words "lye" or "caustic soda," substituted for the words sodium hydroxide?

The purpose of warnings is to give the user information that would afford him the opportunity to shape his conduct, to take such a course of action as may be needed to avoid the possibility of harm. Petitioner had the needed information from the label and, what is more, acted on the information, and when he did it, he came to no harm (264a, 658a-659a).

He had read the label many times (273a, 275a, 658a), and knew that he should be careful to keep "Mule-Kick" away from his hands and face (277a). He knew of the hazards of burns (276a).

As a result of his reading the cautions on the can he used "special care" in pouring the "Mule-Kick" into water (264a-265a). He was always careful not to get the mixture on his hands (264a, 271a, 277a, 279a, 286a). He was always careful to keep the contents of the can or any part of them away from his face (265a, 271a, 277a, 279a). He was careful not to have the contents splatter over him (266a).

His conduct could not possibly have been any different had the words "lye", or "caustic soda" appeared on the label. He was a trained, experienced, licensed plumber (206a, 208a). It is inconceivable that the presence of the words "lye", or "caustic soda", would have deterred him in the slightest from using the product.

There is no suggestion in the record as to what more he could or would have done had the words "lye" or "caustic soda" been substituted for "sodium hydroxide". Clearly,

had the words "lye" or "caustic soda" been on the label, he would not have done things any differently than he had done in the past, or on this occasion, to wit, used special care in pouring, used care to avoid contact with his hand and face, used care to avoid splattering. The presence of the words "lye" or "caustic soda" would not have altered his conduct in the slightest. The absence of the words "lye" or "caustic soda" was, at most to use Pollock's phrase, "negligence in the air", that was not the proximate cause of anything that occurred (*Martin* v. *Herzog*, 228 N. Y. 164, 170).

It follows, therefore, that there was no possible factual basis for a jury to say that had the words "lye" or "caustic soda" been present on the label, what occurred would not have occurred, and hence that the failure to use those words was actionably negligent.

The claim that there was no warning of the danger of splattering. (Petition, p. 11)

Here, again, is argument in the abstract, divorced from the facts. Splattering might occur when a solution is prepared (700A). The way to avoid splattering when a solution is prepared is to pour the caustic soda slowly (700A). That is precisely what the label on "Mule-Kick" advised the user to do—"Pour contents of can into pail SLOWLY, stirring with stick." "Pour solution slowly down drain" (Petition p. 6). As narrated earlier, that is precisely what petitioner did on all the occasions that he used "Mule-Kick", that was how he avoided splattering (264a-266a, 271a, 277a, 279a, 286a).

Since petitioner did exactly as he was advised to do by the label with respect to avoiding the hazards of splattering and since the label told him and warned him of the need to avoid splattering, just what is it that petitioner claims is the connection between the language of the label and what happened to petitioner? There is none.

But apart from that, the accident did not happen when the solution was being prepared, the time when splattering might occur. At the time of the accident, petitioner was not using or preparing a solution of "Mule-Kick". At the time of the accident he was not doing any drain cleaning work at all, he was standing a distance away from the pipe, contemplating what to do next. Preparation of the solution, with the attendant possibility of splattering, had been completed the day before. If by happenstance, a tenant, a visitor or anyone else were to pass by in that room at the time when the "Mule-Kick" was not being used or handled or prepared, it could not be contended that such individuals should have been warned about a splattering that could occur only when the solution was prepared for use. Petitioner's situation at the time of the accident was no different.

Once again, there was no duty to warn petitioner of what he obviously already knew. In any event, the alleged absence of warning had absolutely no proximate relation to what occurred.

POINT II

The authorities relied on by petitioner.

In *Maize* v. *Atlantic Refining Company*, 352 Pa. 51, the warning was in lettering much smaller than that of the other writing on the label. That fact, joined with the name of the product printed in large letters "Safety-Kleen", was held to constitute a negligent and misleading labeling.

Pease v. *Sinclair Refining Co.*, 104 Fed. 2nd 183 (CA 2), dealt with an outright mislabeling, a bottle containing water was marked as containing kerosene. Patently, that is not this case.

POINT III

There was no competent proof that the accident happened as claimed.

The hazard which petitioner says he should have been warned against was the possibility of an "explosion" caused by hydrogen forming by the reaction of "Mule-Kick" with zinc present in the stoppage material. Patently, if petitioner failed to prove such an accident, he has not proved his case.

We urge that petitioner has not made any competent proof of his claim and that the dismissal of the complaint was, therefore, necessary.

The necessary factual premise for the opinion by petitioner's expert was not established

Petitioner's case rested on the testimony of the expert, Dr. Willard, to the effect that there was zinc-containing stoppage material in the galvanized elbow above the clean-out opening, that the "Mule-Kick" had reacted with the zinc in the stoppage material to form hydrogen which ultimately forced out the sodium hydroxide solution through the clean-out opening with resultant spraying on the petitioner. Whether the plug was forced by "explosion" of hydrogen as petitioner's counsel says, or by the pressure of hydrogen, as petitioner's expert claimed, for this theory to have validity, it was essential to establish that the zinc-containing stoppage material was present in the galvanized elbow where allegedly the hydrogen was liberated. There was no such proof.

Almost three years after the accident, Dr. Willard was given the section of pipe containing the clean-out opening from which the sodium hydroxide solution had issued (706a-707a). At the bottom of this pipe, well below the clean-out opening, Dr. Willard found solid, dried up material (706a-707a, 710a) which, upon microscopic analysis,

disclosed, among other matter, the presence of 1.2% zinc (715a-720a, 794a). It was this zinc she claimed that reacted with the "Mule-Kick" to produce the hydrogen (729a-731a, 791a).

There was no aluminum there that could produce hydrogen (804a, 806a).

Voir dire of Dr. Willard elicited that she "assumed" that the zinc-containing stoppage material had prior to the accident, been above the clean-out opening (712a). Obviously she had to assume that it was in the galvanized elbow otherwise there would be no zinc with which "Mule-Kick" (727a, 791a, 829a) could come in contact with and react to produce hydrogen. When objection was taken to her expressing opinions based on that assumption (712a-714a), counsel for petitioner assured the Court that "this will be tied in" (714a). The tieing in was never made. Accordingly, the major premise for Dr. Willard's opinion that the "Mule-Kick" reacted with zinc in the clogging material in the elbow to produce the hydrogen asserted to be the cause of the accident was never established. Her opinion that "Mule-Kick" reacted with zinc present in the clogging material in the galavanized elbow was without any factual foundation whatever and her opinion was without any probative force.

An expert's opinion has no greater force than the grounds on which his testimony shows that it is based (*Riehl* v. *Town of Amherst,* 308 N. Y. 212, 216; *Quinones* v. *St. Vincent's Hospital,* 20 App. Div. 2d 690, affd. 16 N. Y. 2d 572).

There being no factual basis to support the major premise of the hypothetical question posed to the expert, her answer to the question should have been stricken as of no evidentiary value (*Ordner* v. *Reimold,* 278 Fed. 2d 532, 535 (10th Circuit); *Henkel* v. *Varner,* 138 Fed. 2d 934, 935 (U.S.C.A., Dist. of Columbia).

Petitioner's counsel argued that since the zinc-containing stoppage material was found at the bottom of the pipe, it could be inferred that sometime before the accident it had been above the clean-out opening (862a). That inference made, the gist of petitioner's theory was that it could be then further inferred that the stoppage material was present in the galvanized elbow above the clean-out opening; that hydrogen had been liberated at the point, that it was trapped at that point creating pressure on the stoppage material forcing it down to the bottom of the pipe and expelling the clean-out plug. This is the classic example of reaching a conclusion by basing inference upon inference.

In *Leonard* v. *Ashley Welding Mach. & Iron Co.*, 11 App. Div. 2d 1073, aff'd 10 N. Y. 2d 993, there was a fire caused by an explosion in an oil burning furnace. Plaintiff proved that in making repairs to the boiler, defendant's employee had stumbled over its feed line. The next day, the odor of fuel oil pervaded the boiler room and other parts of the premises. There had been no such odor prior to that day. The day after that, there was an explosion. Plaintiff urged, through an expert, that there had been a disturbance of the oil feed line which created a leak in the firebox; that, as a result, oil lay in the firebox until it became heated by the radiant heat of the burning oil from the jet; that as it became heated, it gave off vapors discernible throughout the premises, that when it reached a particular heat and the correct explosive mixture, it exploded. The Appellate Division in reversing plaintiff's judgment and dismissing the complaint wrote:

> "'Although there is proof that defendants came in contact with the fuel line, there is no proof that defendant caused any damage thereto, or that there was an oil leak inside the firebox, or that defendants caused such leak, even if it is presumed that such leakage did occur. The contrary conclusion stated by the expert witness, called by plaintiffs, was based upon an as-

sumption of facts, which were inadequate to sustain the inferences upon which the conclusion rested. Such conclusion could have been reached only by basing inference upon inference. Whenever facts are sought to be proven by circumstantial evidence, every inference must stand on some clear direct evidence, and not on some other inference or presumption. (Lamb v. Union Railway Co., 195 N. Y. 260, 266; Ruppert v. Brooklyn Heights RR. Co., 154 N. Y. 90)."

The above is precisely the posture of Dr. Willard's opinion.

The only proved *fact* was the presence of zinc of unknown origin in the stoppage material found at the bottom of the pipe below the clean-out opening. The various opinions expressed by Dr. Willard, all premises of her finding a small quantity of zinc in stoppage material at the bottom of the pipe, constituted a series of intermediate conjectures leading to the ultimate desired conjecture.

"Words put in the form of an opinion uttered by a witness, even though he be an expert cannot create an issue of fact when the factual basis for the opinion does not sustain his conclusion."

Strasberg v. *Equitable Life Assurance Society*, 281 App. Div. 9, 13.

There was insufficient factual data for Dr. Willard's opinion.

An expert's willingness to give an opinion on the basis of patently inadequate and insufficient data, does not mean that he should be allowed to do so on the theory that the insufficiency of the data merely affects the weight to be given to his opinion. Willingness to render an expert opinion is no substitute for the facts needed as a foundation for a scientific opinion. It outrages all concepts of the

judicial process to say that a question of fact can be made by an expert's opinion, merely because the expert is amenable to giving one notwithstanding the lack of information necessary for a valid opinion.

Dr. Willard did not, by far, have adequate data to render her opinions.

It should be noted that Dr. Willard, testifying about phenomena dealing with drain pipes and drain cleaning materials, had never made any study of drain cleaning preparations in general (789a). She had never made any analysis of drain cleaners for manufacturers or distributors (789a-790a). She had never had any commercial connection with drain cleaning preparations (790a). Perhaps her inexperience is the reason why she felt no inhibitions about rendering opinions despite enormous gaps in information.

She was not told how much "Mule-Kick" had been used (739a).

She was not told how much water had been used (739a).

She assumed that the accident occurred between an hour or hour and a half after the second solution of "Mule-Kick" was poured into the sink (741a). The fact of the matter was that the accident occurred the day after the pouring of the second solution.

She was not told about any ice blockage, only that there were ice flakes (750a).

She was not told about the size or location of the ice inside the pipe (757a, 760a), but "assumed," nevertheless that it was not sufficiently large to cause blockage (771a).

She did not know that the torch plaintiff used to thaw the ice in the pipe generated heat of 3800° Fahrenheit (751a).

She could have measured the amount of hydrogen that was liberated but had made no such measurements (795a).

The amount of hydrogen emitted can be calculated from the quantity of zinc that is present (795a-796a). She did not know the weight of the stoppage material which contained the zinc she was urging as the source of the exploding hydrogen (796a). She could not say how much hydrogen had been liberated by the 1.2% zinc in the stoppage (794a).

She did not know how long the zinc had been in the pipe (791a, 839a-840a). She could not state its source (796a, 807a).

The prevailing temperatures ranged from below 0 to 20° during the three days in issue. Dr. Willard was not told anything about those temperatures although she had inquired about them because of their possible effect on the production of hydrogen (828a). When it is cold, zinc will not react to produce hydrogen (847a, 958a).

She did not test any galvanized pipe with caustic solutions to see what the reactions would be (830a).

She knew nothing of the prior use of pipe cleaning preparations (841a). There was testimony that the tenants had, a few days earlier, inserted drain cleaning preparations into the pipe. She had not been told of that (779a-780a).

She said that the hydrogen did not escape upwards because of the presence of the column of water above it (839a). She conceded that the column's capacity to prevent escape of gas depended upon its weight (833a). She did not know what that was but "assumed" a length of column sufficient to hold back the hydrogen (833a-834a).

We submit that such tremendous lacunae in information are fatal to the probative value of her opinion, they make her opinion sheer conjecture.

An expert's willingness to assume whatever is needed for the purpose of rendering opinion despite absence of vital facts, his readiness to say the magic word that is required to establish a *prima facie* case does not constitute proof.

We believe that the analysis of Dr. Willard's testimony makes applicable the oft-repeated rule:

> "When we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none that ought reasonably to satisfy a jury and the facts sought to be proved is established."

Matter of Case, 213 N. Y. 199, 204.

POINT IV

The physical facts demonstrate that there was no accident caused by hydrogen as claimed.

If hydrogen formed as claimed by petitioner, it would begin forming the moment that there was contact between the sodium hydroxide and the zinc., and would continue to form during all the time of such contact (835a-836a). Were plaintiff's theory correct, hydrogen would have begun forming on January 25th, and continued to form until the accident occurred on January 27th.

Admittedly, hydrogen is fourteen times lighter than air and its natural tendency would be to rise and escape (831a, 836a). If forming in liquid, the hydrogen would visibly bubble up, particularly if heat were applied. Dr. Willard testified at page 841a:

> "Q. Assuming that hydrogen gas is there, was there, whenever the high caustic or high amount of caustic was put in there, assuming that hydrogen was there the 25th, 26th and 27th, when the torch was applied,

wouldn't that heat tend to send the gas up? A. Yes, it might.

"Q. Especially if you had heat of 3500° Fahrenheit, that would send the gas up, wouldn't it and disappear? A. But you would see it bubbling.

"Q. You would see it bubbling through? A. Yes."

It was admitted that no such bubbling phenomenon was ever observed. The pipe on the second floor was open, plaintiff looked into it shortly before the accident, the mixture was visible to him (347a). It did not spray up out of the pipe (347a), it showed no signs of pressure or of gas of any kind (348a), there was no propulsion upward of any fluid (349a).

It is simply inconceivable that if hydrogen were forming at the elbow since January 25th, there would, during the two and a half days of its continuous liberation, be no evidence whatever of its bubbling up and out.

Here then was a conceded, physically observed phenomenon, conclusively demonstrating that no gas was forming or escaping and completely negating the theory of the presence and formation of gas. When opinion explanations are contradicted by the physical facts, the facts must prevail. (*Strasberg* v. *Equitable Life Assurance Society,* 281 App. Div. 9, 13; *Higgins* v. *Mason,* 226 App. Div. 426, 429; *Kinney v. State,* 191 Misc. 128, 134.)

There was no evidence of the consequences that one would normally expect to follow an "explosion" of hydrogen in a pipe, such as a busting or splitting of the pipe, a tremendous noise, a flash of some sort, a fire of some kind. There was no proof that when the "explosion" occurred there was any splattering of liquid on the second floor, where the pipe was open permitting ready escape of anything in it, were there an explosive force acting inside the pipe. Altogether it is clear that there was no explosion of hydrogen.

The occurrence, however, was not a mystery shrouded happening, it was readily explainable.

As indicated earlier, before any suit was contemplated, petitioner had stated that he had determined the cause of the blockage to be ice in the pipe above the clean-out opening. He had used a Presto-lite torch to melt or thaw out this ice after having hand-tightened the plug that covered the clean-out opening. Dr. Snell, testifying for the defendant, explained what happened. When the ice blockage finally thawed or melted, there was nothing to hold back the column of water above it, it fell by force of gravity creating a sufficient pressure to force out the hand-tightened plug and cause the solution to spray out of the opening (988a-989a).

Dr. Snell had recreated the conditions in the pipe—the column of water, the clean-out opening, the stoppage; when the obstruction to the column was removed the water fell and sprayed as the solution did in the accident (989a-996a).

Dr. Willard admitted that if there were ice in the pipe obstructing the column of water above, the column would exert pressure on the blocking ice (762a-764a). She admitted that the column tended to force the obstruction down (764a). She admitted that if the "Mule-Kick" mixture had been standing in the pipe, it would be restrained by the ice blockage from flowing away (763a). She admitted that if the ice blockage were removed, there would be a free fall of the column of water with the "Mule-Kick" in it (764a). She conceded that application of the Presto-lite torch would tend to melt and thaw the ice blockage (759a-760a). She conceded that the thawing of the ice, plus the pressure exerted by plaintiff in manipulating the snake on the second floor, might have contributed to the fall of the column of the mixture in the pipe (774a).

Since it is at least as likely that that happened as what petitioner claimed happened (we submit that the free fall is the true explanation for what occurred), respondent may

not, under Pennsylvania law, be held liable. (*Hopkins* v. *E. I. DuPont de Nemours & Co.*, 212 F. 2d 623, quoted, *infra*, at pp. 3-4.)

Reasons for Denying the Writ

We have demonstrated that the issues here are all factual, properly decided in accordance with applicable state law.

The petition, therefore, lacks substantial ground because it turns upon the particular facts involved.

Sufficiency of evidence does not ordinarily induce granting of a writ. (*N. Y. Cent. R. R.* v. *Kinney*, 260 U. S. 340, 346 [1922].) "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." (*General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178 [1938].) "The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts * * *" (*Huddleston* v. *Dwyer*, 322 U. S. 232, 237 [1944]).

CONCLUSION

There are no exceptional circumstances in this case warranting review by this Court. The petition should be denied.

Respectfully submitted,

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